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No. 92-7247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEE FARMER, *Petitioner*

v.

EDWARD BRENNAN, WARDEN, *et al.*, *Respondent*

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

[REDACTED] BRIEF OF STOP PRISONER RAPE,
AMICUS CURIAE
IN SUPPORT OF PETITIONER

Frank M. Dunbaugh,
744 Holly Drive North,
Annapolis, MD 21401
(410) 974-0555
Counsel for Amicus

November 14, 1993

BEST AVAILABLE COPY

No. 902-7247

Dee Farmer, Petitioner

v.

Edward Brennan, Warden, et al., Respondent

5

MOTION FOR LEAVE TO FILE BRIEF

AS AMICUS CURIAE

Stop Prisoner Rape (hereafter SPR) hereby respectfully moves this Honorable Court for leave to file this attached brief as *amicus curiae* in the above-captioned case and as grounds for this motion

10 states: (1) SPR is a national association founded in 1979 as "People Organized to Stop Rape of Imprisoned Persons." (2) SPR is an organization dedicated specifically to prisoner rape issues, and the instant case presents the question of the standard of protection from rape owed by prison officials to prisoners. Most of its officers,

15 directors, and members are victims of rape behind bars, hence its collective experience with this problem is great and its internally gathered data is cumulatively conclusive. (3) SPR's president, Stephen Donaldson, is the author of the *Prisoner Rape Education*

Project¹ (an audio and written manual designed for prisoner rape avoidance and treatment of survivors, sponsored by the New York State Council of Churches), has been speaking and writing on the subject for 20 years, is a trained rape counselor², has lectured on prisoner sexuality at Columbia University³, and founded and led the Committee on Male Survivors of the New York City[-sponsored] Task Force Against Sexual Assault. (4) The consents of the attorneys for the petitioner and the respondents have been requested to consent to the filing of this brief, but had not been received when we went to press.

Respectfully submitted,

Frank M. Dunbaugh,
744 Holly Drive North,
Annapolis, MD 21401
(410) 974-0555
Counsel for Stop Prisoner Rape

November 14, 1993

¹ Brandon, VT: The Safer Society Press, 1993.

² St. Vincent's Hospital Rape Crisis Center, New York City, 1984. He co-chaired the male counselors group.

³ University Seminar on Homosexualities, January, 1993

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- 15

INTEREST OF AMICUS CURIAE

Stop Prisoner Rape (hereafter SPR), a national association, founded 1979 as "People Organized To Stop Rape of Imprisoned Persons," exists to provide education, information, and advocacy on the sexual assault of prisoners (see Appendix E). The instant case gives this Court an opportunity to set a tone and provide direction to lower courts and to confinement officials on prisoner rape issues and thus is of grave concern to SPR's membership.

SUMMARY OF ARGUMENT

10 The rape of prisoners is a widespread phenomenon, which tends to be a repetitive problem for its victims, a deadly risk in the age of AIDS, a devastating experience whose psychological and physical consequences are known and described as Rape Trauma Syndrome. The problem of prisoner rape needs to be seen in the

15 contexts both of violence and of sexuality. It is a practice which is ingrained in the culture of confinement, both among prisoners and prison officials. The injuries occasioned by prisoner rape are predictable and preventable using appropriate strategies.

ARGUMENT

INTRODUCTION

Little has changed since Rev. Louis Dwight first investigated sexual abuse in American prisons in 1824 to 1826, visiting "most of the prisons...between Massachusetts and Georgia" and finding "melancholy testimony to establish one general fact, viz., THAT BOYS ARE PROSTITUTED TO THE LUST OF OLD CONVICTS." [upper case in original] Rev. Dwight pleaded: "Nature and humanity cry aloud for redemption from this dreadful degradation."⁴

One hundred seventy years later, they still cry.

"In this case we deal with a subject matter which has become a national disgrace in some of our nation's prisons. We speak, of course, of the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates."

⁴ Dwight's broadside of April 25, 1826 is quoted in Jonathan Katz, ed., *Gay American History*, NY: Thomas Crowell, 1976, p. 27f.

This sad description from the Eighth Circuit's decision in *Martin v. White*, 742 F.2d 469, 470 (8CT, 1984) applies to the case before the Court as well.

The rape of males has long been a taboo subject,⁵ barricaded with popular misconceptions, and the phenomenon of prisoner rape [the term "homosexual rape" in the prison context is extremely misleading and should be avoided] is little discussed outside penological circles, nor is it understood despite its great importance in prison life. This brief will attempt to provide some insight into the nature of the problem.

⁵ for a general discussion giving important background information, see Stephen Donaldson, "Rape of Males" in Wayne R. Dynes, ed., *Encyclopedia of Homosexuality*, New York: Garland, 1990, vol. 2, p. 1094-1098.

A. PRISONER SEXUAL ASSAULT IS WIDESPREAD

Few aspects of incarceration are more horrifying than the prospect of sexual exploitation and forcible rape within jail and prison walls. It is a subject to which society reacts with a combination of fear, disgust, and denial. We don't want to believe that our criminal justice system tolerates such a cruel and unusual form of punishment. However, this is a brutal reality faced daily by inmates in crowded prisons and jails throughout the country, including bucolic Vermont....The issue of coerced sex will not simply go away. It is a fact of life for those behind bars.

—John F. Gorczyk, Commissioner of Corrections, State of Vermont⁶

Ten years ago the Eighth Circuit found in *Martin, supra*, at 472-

73: "The pervasive nature of prison [sexual] assaults is well documented. Justice Blackmun summarized the findings of researchers and governmental agencies in this area as follows:

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison

⁶ In Foreword to the *Overview/Manual for Jail/Prison Administrators and Staff of the Prisoner Rape Education Project*, Brandon, VT: Safer Society Press, 1993.

vices of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.

US v. Bailey, 444 US 394, 421-22 (1980; Blackmun, J., dissenting)."

The best systematic survey of sexual assault in a prison was undertaken by a sociologist, Prof. Wayne Wooden, with Jay Parker,⁷ in 1979-80 in a medium-security California prison.⁸ They reported that 14% of all prisoners had been "pressured into having sex against their will" in that prison.⁹ The authors stated "our

⁷ Wooden was in the Department of Behavioral Sciences at California State Polytechnic University; Parker studied at California State University at Fullerton.

⁸ Wayne Wooden and Jay Parker, *Sex Behind Bars: Sexual Exploitation in Prison*, New York: Plenum, 1982.

⁹ Prisoners who had previously learned from rape in jails or other prisons to pair off with a "protector" as soon as they got to that prison were thus not counted, even though they had to engage in continuous unwanted sex.

study is likely *underreporting* certain types of sexual behavior (i.e., sexual coercion and assault).¹⁰

A 1974-75 study by Daniel Lockwood of a wide sampling of New York State prisons found that 28% of the prisoners had been targets of sexual aggression.¹¹ Other published studies which attempt to measure the incidence of sexual assault in prisons suffer from serious methodological problems¹² and are of little use.

It is generally accepted that the incidence rate of sexual assault in prison tends to be *highest* in *maximum security* prisons and lowest in minimum security ones.¹³

¹⁰ Donald Cotton and Nicholas Groth, two of the most widely known psychologists to deal with prisoner rape, observed in 1984 that "available statistics must be regarded as *very conservative at best*, since discovery and documentation of this behavior are compromised by the nature of prison conditions, inmate codes and subcultures, and staff attitudes." From "Sexual assault in correctional institutions: prevention and intervention," in *Victims of Sexual Aggression: Treatment of Children, Women and Men*, Stuart, I.R., ed., New York: Van Nostrand Reinhold.

¹¹ Daniel Lockwood, *Prison Sexual Violence*, New York: Elsevier, 1980.

¹² An example is Nacci and Kane's investigation of the federal prison system, where they asked prisoners whether they participated in "homosexual" activity. Since most prisoners, unlike white middle-class academics, do not consider sexual penetration of another prisoner to be "homosexual," reserving that term for the passive/penetrated role only, and themselves remain very strictly in the active/penetrative role, they would answer Nacci and Kane's questions in the negative even if they were having sex regularly.

¹³ See Stephen Donaldson, "Prisons, Jails and Reformatories," in Dynes, ed., *op. cit.*, p. 1041.

Since the Court's rulings are also applied to residents of jails¹⁴ and juvenile institutions, we call attention to the only published survey of a jail, Chief Assistant District Attorney Alan J. Davis' thorough study, assisted by the police, of the Philadelphia system in the late 1960s.¹⁵ Davis, who also believed his study *underreported* victimization, found that 3.3% of all males who passed through the Philadelphia jails were sexually assaulted, and that two-thirds of these assaults resulted in completed rape.¹⁶

No detailed survey of sexual assault in juvenile facilities has been published,¹⁷ but there is a general consensus that victimization

¹⁴ For a description of the differences regarding rape between jails and prisons, see Wilbert Rideau's and Billy Sinclair's gripping inside article, "Prison: The Sexual Jungle." First published in *The Angolite*, it was reprinted in Scacco, ed. *op. cit.*, p. 17-19.

¹⁵ Alan J. Davis, "Sexual Assault in the Philadelphia Prison System and Sheriff's Vans," *Transaction*, 6 (2), 1968, p. 8-16; reprinted in Scacco, ed., *op. cit.*, and elsewhere.

¹⁶ These surveys remain undisputed in the scholarly and penological literature, and the amicus knows no reason to believe that time has diminished the problem.

¹⁷ There is considerable anecdotal material, including most of Anthony Scacco's monograph, *Rape in Prison*, Springfield, Ill.: Charles C. Thomas, 1975 (Scacco worked in the Connecticut juvenile system as a forensic psychologist.); Clemens Bartollas, Stuart J. Miller, and Simon Dinitz, "The 'Booty Bandit': a Social Role in a Juvenile Institution," *Journal of Homosexuality* 1:2 (1974), reprinted in Scacco, ed., *op. cit.*; and there is some data on offender and victim characteristics in Bartollas, Miller and Dinitz, "The Exploitation Matrix in a Juvenile Institution," *International Journal of Criminology and Penology*, 4:257 (1976).

rates (and the level of violence generally) are higher there than in adult institutions,¹⁸ and that "juveniles in adult prisons appear to suffer increased danger of sexual/physical violence."¹⁹ A recent study of six training schools which included both sexes found

5 "almost 10% of the residents are identified as sexual victims. They are usually fourteen-or fifteen-year-olds."²⁰

B. PRISONER SEXUAL ASSAULT IS REPETITIVE FOR ITS VICTIMS

"Once an inmate is raped, he is marked as a victim for repeated

10 sexual assaults for the remainder of his imprisonment." *LaMarca v. Turner*, 662 F. Supp. 647, 686 (S.D. Fla., 1987), *aff'd in part and vacated in part on other grounds*, 995 F.2d 1526 (11CT, 1993). "Anybody young, passive or feminine is going to be constantly pressured and 'hit on' and often either threatened or actual-

15 ¹⁸ Bowker discusses this at some length in chapter 3 of *Prison Victimization*, NY: Elsevier, 1980.

¹⁹ Robert W. Dumond, "The Sexual Assault of Male Inmates in Incarcerated Settings," *International Journal of the Sociology of Law*, 1992, vol. 20, p. 141. Dumond is a clinical psychologist with the Massachusetts Department of Corrections.

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²⁰ Clemens Bartollas and Christopher M. Sieverdes, "The Sexual Victim in a Co-educational Juvenile Correctional Institution," *The Prison Journal*, spring-summer 1983, p.88.

ly physically forced or raped."²¹ "Generally, those who are turned out [raped] and made into [sexual] slaves remain slaves and never can get out of that," said a noted authority on prisons, Dr. Frank L. Rundle, a former prison psychiatrist.²² "The most serious problem associated with coerced sex in prison is the 'no-win' situation it creates for the victim, which is the primary issue that prevents inmate victims from reporting the offense."²³

5

Unless the victim is immediately removed from general population and remains in isolation or segregation *for the remainder of*

10 *his confinement*, he will promptly become *marked* by the other prisoners as a "punk"²⁴, and then subjected to repeated sexual aggression, virtually on a daily (or nightly) basis.²⁵ Segregation

²¹ Wooden and Parker, *op. cit.*

²² Dr. Rundle, former Chief Psychiatrist of the huge Soledad prison and Director of Psychiatry for the entire New York City jail system, is quoted in Rideau and Sinclair, *op. cit.*

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²³ Cotton and Groth, "Inmate Rape: Prevention and Intervention" in *Journal of Prison & Jail Health*, 2:1, (1982), p. 49.

²⁴ "An inmate who has been forced into a sexually submissive role" (Wooden and Parker, *op. cit.*) There are many other terms current in prisoner slang, but "punk" is most widely understood among prisoners and is also used by most scholarly writers.

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See Stephen Donaldson, "Punk," in Dynes, ed., *op. cit.*, p. 1085-86.

²⁵ The same will be the lot of any prisoner who becomes known as "homosexual," as prisoners use the term—i.e., one willing to accept sexual penetration "on the Street."

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Assaults against prisoners in "protective custody" are well documented.²⁶

If a rape victim does not commit suicide²⁷, he finds little alternative to continual gang-rape but to "hook up" (form a relationship) with a strong or feared prisoner (his "Man"), who uses him sexually in exchange for protecting him from other prisoners.²⁸

"For a majority of these 'targets,' the best and safest coping strategy is to 'hook up' with a jocker, an inmate dominant

²⁶ "Protective custody" is commonly a status assigned to prisoners housed in administrative segregation units rather than in separate housing units, especially in the federal system, so that "protected" prisoners are often in fact exposed to violently aggressive prisoners awaiting disciplinary hearings; even where "protective custody" cases are kept apart from other segregation cases, those who are sexual targets are mixed with prisoners who have gone over their heads in debt, who have crossed a powerful gang, become informers, etc., and who are not inhibited from becoming sexually aggressive. Dumond notes: "Since there is no distinction by reason, many institutional protective custody units also serve as the punitive environment for inmates who have violated institutional disciplinary policy." *Op. cit.*, p. 150.

²⁷ Raped prisoners are at high risk of suicide according to J. R. Rowan and L. M. Hayes, *Training Curriculum on Suicide Detection and Prevention in Jails and Lockups*, Boulder, Colorado: National Institute of Corrections, 1988. We emphatically agree.

²⁸ Cotton and Groth, *op. cit.*, p. 50.; Davis, *op. cit.*

enough to protect them....Bonding between two homosexuals (gay bonding) is *not* allowed within the prison culture. A homosexual or kid [punk] is expected to hook up with a 'man.' This is the unwritten law, and it is enforced....This coded obligation of the 'old man' to protect the homosexual or punk is adhered to, even to the point of violent defense."²⁹

Since this type of relationship ("*protective pairing*," see Appendix C) is, from the punk's perspective, neither fully consensual (being undertaken out of extreme duress) nor violently assaultive, since the punk often has a choice of would-be "protectors" and (in relatively less violent institutions³⁰) some negotiating leverage—once he has accepted the basic framework of sexual obedience—it has come to be referred to as "*survival-driven*" sexuality.³¹ It is emphatically *not*, however, desired by the (usually heterosexual) victim/survivor, only endured as the least heinous option available to him, although he is usually penalized (and thus revictimized) by institutional disciplinary codes if caught at it. "Prison officials are

²⁹ Wooden and Parker, *op. cit.*

³⁰ "In maximum security prisons...the homosexuals and punks are virtually the slaves of their partners." (Wooden and Parker, *op. cit.*)

³¹ For a fuller description, see Appendix C.

too quick to label such activities 'consensual,'" noted Davis. (*op. cit.*)

Sexual assault is, therefore, always an ongoing issue for victims behind bars; it is never laid to rest after a single incident, since the victim must pay with unwanted sex for protection, endure repeated gang rapes, or suffer the deprivations of isolation in segregation, which over the long run (as the early history of American penology has shown)³² can result in mental impairment and in the short run, as prison psychologist Robert Dumond notes, "further alienates and stigmatizes the inmate with both staff and inmate alike."³³

C. AIDS MAKES PRISONER SEXUAL ASSAULT DEADLY

Since prisoner rape is usually perpetrated by multiple rapists, and anal rape commonly involves tearing of the rectal lining and bleeding, thus affording easy transmission of the HIV virus, it follows that prisoner rape is now a deadly threat to the victim.

³² Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America*, New Haven: Yale University Press, 1992, p. 192 n 104.

³³ Robert Dumond, *op. cit.* p. 150.

"The spread of the HIV virus into prisoner populations has turned rape from a source of psychological and emotional devastation into a life-and-death issue with resulting illnesses that create havoc for the prisoner and new difficulties for systems all over the country."³⁴

Considering that rape victims tend to be the least violent of all prisoners (Davis, *op. cit.*; see p. 31, *infra*), the combination of rape and HIV can turn a sentence for a non-violent offense, an inability to make bail, and even a status offense for a juvenile into a potential death penalty decreed by no legislature and no judge. The fear of such a slow but certain death must be a terrifying spectre for all prisoners.

The deadly risk of HIV has numerous important consequences for rape victims which may not immediately be apparent to those on the outside. It makes the choice of resistance to the bitter end a

³⁴ Fay Honey Knopp, in the "Introduction: A Matter of Life and Death" to the *Overview/Manual of Donaldson, Prisoner Rape Education Project*, *op. cit.* (which she edited). Knopp was until a few months ago director of The Safer Society Program and Press, a national project of the New York State Council of Churches, headquartered in Brandon, Vermont, and is now its research director. Safer Society has published numerous books, workbooks, and other materials on sexual assault issues and maintains a national referral directory for treatment programs. Knopp also has a history of nearly 40 years of prison ministry, having been until recently one of the few National Visitors of the Prison Visitation Service, an interdenominational agency accredited to the Federal Bureau of Prisons, whose institutions it services.

death-dealing one, since bloody anal rape carries a very high risk of infection, while oral sex carries little or none. Thus the target of sexual assault, faced with a hopeless situation, may save his life by compromising and "cooperating" with his assailant. This may well appear "consensual" to institutional authorities, resulting in disciplinary charges against the victim, but in actuality there is no free choice in the face of such a deadly threat.

D. PRISONER SEXUAL ASSAULT IS DEVASTATING

It is now firmly established³⁵ that the rape of a male produces a catastrophic and even life-threatening psychological and often physical³⁶ complex of injuries called Rape Trauma Syndrome (RTS).³⁷ (see Appendix A)

This is a type of Post-Traumatic Stress Disorder, a recognized classification of the American Psychiatric Association, and one widely known from the experiences of our Vietnam veterans.

³⁵ See the articles listed in Appendix D.

³⁶ Bowker discusses the physical illnesses which accompany RTS in *op. cit.*, p. 16.

³⁷ One concise summary of RTS for prisoners is in Cotton and Groth, "Inmate Rape," *op. cit.*, p. 51-52.

"Even an instance of sexual assault that does not conclude with an actual rape can cause severe psychological problems."³⁸ Richard Jones and Thomas Schmid demonstrated how dramatically even reports of rapes affect new prisoners in particular.³⁹

Incarcerated victims are unable to withdraw from the setting of their victimization, and indeed are constantly exposed to it anew, making it extraordinarily difficult to recover from the trauma until released.⁴⁰ Since few institutional mental health professionals are trained to deal with RTS, the healing process cannot even begin for most victims while they remain confined.⁴¹ The Eleventh Circuit recently recognized that a prison's "failure to make adequate psychological counseling available to rape victims constituted cruel and unusual punishment because it constituted deliberate indifference to a serious medical need" and justified injunctive relief to

³⁸ Fay Honey Knopp in the Introduction to the *Overview/Manual to the Prisoner Rape Education Project*, *op. cit.*

³⁹ Richard S. Jones and Thomas J. Schmid, "Inmates' Conceptions of Prison Sexual Assault," *The Prison Journal*, spring-summer 1989 issue, p. 53-61.

⁴⁰ "What is most apparent from both observing and interviewing these youngsters is how their body language indicates defeat and even humiliation." (Wooden and Parker, *op. cit.*)

⁴¹ "No matter how self-affirming a person may be, it is most difficult to stand alone in the absence of all social support." Dumond, *op. cit.*

"require special training for the staff psychiatrist and the staff psychologist, and promulgate an official referral procedure for all rape victims to the resident psychiatrist or psychologist for evaluation." (*LaMarca v. Turner*, 995 F.2d at 1534, 1544)

5 Even with trained counseling, RTS frequently has lifelong disruptive effects on a survivor's general functioning, self-esteem, sense of gender identity, and sense of sexual orientation. Without it, these impairments are assured. To put it bluntly, without treatment, rape will ruin a man's life.⁴²

10 In the absence of general staff training which includes familiarization with RTS, the way in which staff members deal with rape victims tends to *exacerbate* the rape trauma and constitutes a *continuing* psychological injury, rubbing salt in the wound.⁴³ Apart from Glades Correctional Institution, which was enjoined to adopt
15 a staff-wide training program in sexual assault issues as a result of

⁴² Edward H. Peeples, Jr., and Anthony M. Scacco, Jr., "The Stress Impact Study Technique: A Method for Evaluating the Consequences of Male-on-Male Sexual Assault in Jails, Prisons, and Other Selected Single-Sex Institutions," in Scacco, ed., *op. cit.*, p. 241-278.

20 ⁴³ "Unprepared, the staff member's intervention may compound rather than ameliorate the impact of the victimization." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 54. For a fuller discussion see Appendix A.

LaMarca (at 1544), the amicus knows of no other confinement institution with *any* kind of training program devoted to sexual assault issues, or which includes a discussion of RTS.

5 E. PRISONER SEXUAL ASSAULT NEEDS TO BE SEEN IN BOTH THE CONTEXTS OF VIOLENCE AND OF SEXUALITY

It may seem a truism that sexual assault is an act of violent assertion of power, control, and dominance, but it is easy to forget to place rape in the context of the general violence of the institution
10 concerned. Some courts have inferred a high level of sexual assault from a high level of general violence in a particular institution.⁴⁴ This is a sound inference.⁴⁵

Rape in the sex-starved environment of the all-male institution, where few will voluntarily accept a submissive/penetrated role, is
15 also—and here there is a *distinction to be drawn from rape in the*

⁴⁴ Most explicitly the district court in *LaMarca*, 662 F.Supp at 678, and the Third Circuit in *Young v. Quinlan*, 960 F.2d 351, 363 (CT3, 1992)

20 ⁴⁵ "Inmate sexual assault is a serious problem that constitutes a major undercurrent in incidents of institutional violence." Cotton and Groth, "Inmate Rape," *op. cit.*

community—distinctly colored by sexual deprivation.⁴⁶ Since almost all prisoner rapists are heterosexual in identity and practice outside of confinement,⁴⁷ and they regard their victims as substitutes for unavailable females, they tend to target those who, in their eyes, can plausibly be assigned feminine characteristics: the beardless smooth-skinned youth; the small; the passive or "weak;" the non-fighter;⁴⁸ and especially the homosexual.⁴⁹ Noted Wooden and Parker: "In prison there is an institutionalized social pressure, both overt and covert, toward feminizing homosexuals and the kids [punks]." (*op. cit.*)

⁴⁶ Donald Tucker, who experienced prisoner sexuality as a rape victim and punk, is most emphatic on this point, bitterly criticizing "armchair theorists" who deny its importance without ever having lived behind bars, in "A Punk's Song: View From the Inside," in Scacco, ed. (*op. cit.*)

⁴⁷ Thus the practice of some writers of referring to "homosexual rape" or to prison rapists as "aggressive homosexuals" is uninformed and very misleading and should be abandoned. In context, it is quite clear simply to refer to "rape" and to "sexually aggressive prisoners."

⁴⁸ See e.g., *Butler v. Dowd*, 979 F.2d 661, 667, 675 (8CT, 1993)(*en banc*) (younger, smaller, naive, and passive); *Redman v. County of San Diego*, 942 F.2d 1435, 1448 (9CT, 1991)(*en banc*) (young prisoner), *cert. denied*, 112 S.Ct. 972 (1992); *Martin v. White* 742 F.2d 469, 475 n. 6 (8 CT, 1984)(new admissions to prison); *Wuhers v. Levine* 615 F.2d 158, 161 (4CT, 1980)(younger prisoners), *cert. denied* 449 US 849 (1980); *Jensen v. Gunter* 807 F. Supp. 1463, 1482-83 (D.Neb. 1992), *appeal dismissed* 992 F.2d 183 (8CT, 1993).

⁴⁹ Bowker discusses this tendency to "redefine their victims as females, and even refer to them as 'girls'" at greater length in *op. cit.*, p. 11. This may explain why the old, ugly, and obese are less likely to be targeted for rape.

F. SEXUAL ASSAULT IS A FUNDAMENTAL PART OF THE CULTURE OF CONFINEMENT AND IS SELDOM REPORTED

Prisoner rape is not just a psychological phenomenon, an abuse of power by disturbed individuals who react to their loss of personal power during confinement by seeking to exert it over one of their fellows. It is also a sociological phenomenon, a custom which has become an institutionalized part of life behind bars and as such is tacitly accepted, if not endorsed, by most prisoners and administrators. Therefore few prisoners take steps to counter it⁵⁰ unless their personal or group safety is at stake, and prison administrators are also reluctant to challenge this social structure.

"The issue, categorically, is not homosexuality but heterosexual brutality," wrote the late Dr. Anthony Scacco, Jr., a forensic psy

⁵⁰ There are exceptions: Stop Prisoner Rape was founded by Russell D. Smith, a married prisoner, and today includes among its incarcerated members a substantial number who have never been raped and are not themselves at risk, but who speak out against rape in their institutions and try to help newcomers avoid it. Smith's vision was that eventually enough prisoners would be persuaded to oppose rape that they would be able to protect targets and make the custom of rape socially unacceptable even behind bars.

chologist in the Connecticut juvenile confinement system who pioneered the study of prisoner rape, in the preface to his anthology, *Male Rape* (*op. cit.*). Confinement institutions are full of young males who do not check in their sexual drives at the jail-house door; the customary sexual activity for these males is penile penetration, by which most of them define their "manhood;" and there are relatively few actual homosexuals willing to assume the passive (and assigned "feminine") penetrated role.

"The rapists are usually heterosexual; many have wives and children. In almost all cases, the victims also are heterosexual." Thus reported Loretta Tofani in her Pulitzer-Prize-winning series, "Rape In the County Jail: Prince George's Hidden Horror," in *The Washington Post*, September 26-28, 1982. The result is an enormous imbalance of demand for, and supply of, willing passive sexual partners, on the order of 100 to 1.⁵¹ Outside observers can barely imagine the social consequences of this situation.

⁵¹ For a typical prison; in a jail serving a city with a large gay population the ratio may come down as "low" as 20:1.

The immediate result is enormous pressure to "turn out" unwilling males to fill the demand for passive "partners."⁵² The chief means by which this is done is rape and the convincing threat of rape. This produces a secondary effect: the status of "manhood" is in perpetual jeopardy, with aggressive, sexually deprived men looking to exploit any weakness in order to turn out, and hopefully acquire for their own use, a new punk. This is a major force driving the pervasive atmosphere of competitive violence which permeates jails, prisons, and juvenile institutions (sometimes referred to as "gladiator schools").

A great deal of the violence in confinement is related to sexual aggression and sexually expressed dominance struggles. (Bowker, *op. cit.*, p. 15-16) As many have observed, violent combat to "prove your manhood"⁵³ is a routine part of a new prisoner's in-

⁵² This "turning out" process is described in detail in Nobuhle R. Chonco, "Sexual Assaults Among Male Inmates: A Descriptive Study," *The Prison Journal*, spring-summer 1989, p. 72-82, and in Bowker, *op. cit.*, p. 14-15.

⁵³ "In jail manhood is everything because you have nothing else." Former prisoner Dwight Welcher, quoted in Tofani, *op. cit.*

introduction to most male facilities.⁵⁴ Few of these fights are reported to staff, and when they are, their sexual underpinnings are usually hidden (Tofani, *op. cit.*). Therefore any efforts to weaken the acceptability of the custom of rape will also go a long way to

5 minimize the general level of violence. Far from conflicting with security needs and penological goals, any reasonable measures to combat sexual violence will reinforce order and security generally.

One of the key findings of Davis' study (*op. cit.*) which is critical to understanding prisoner rape, and which he explained in some

10 detail, is that only 3.2 % of the sexual assaults his investigators

⁵⁴ "The fear of rape encourages many inmates to arm themselves with 'shanks,' knives they make....It also encourages many inmates to behave more violently in jail than they normally would, even raping others so that they will not be raped, according to some inmates. Eventually, these people get out of jail, with a lot of experience in behaving violently." Tofani, *op. cit.*

uncovered were ever mentioned in official jail records.⁵⁵

"Prison officials know this," wrote David Rothenberg, then executive director of The Fortune Society, a large social service organization for newly released prisoners in New York, "yet they continue to offer low statistics on prison rape" based on their official

5 reports.⁵⁶

One reason for this lack of reporting is the reluctance of prisoners to be identified as informers. "If he reports the victimization to the authorities, he acquires the label of a 'snitch' or informer

10 and places his life in jeopardy. This 'jacket' will follow him while he remains in the correctional system and will expose him to fur-

⁵⁵ Tom Cahill, now executive director of Stop Prisoner Rape, estimated in his column in the *Bay Area Reporter*, August 8, 1985, that "one in a hundred" males raped in confinement report their abuse. Cahill succeeded Russell Smith as head of SPR in 1983 and served as such until 1988, when Donaldson became president and he assumed his current duties.

Tofani reported in the *Post* that despite an official figure of less than 10 rapes a year among male prisoners, on-the-record interviews with 10 guards, 60 prisoners, and one jail medical staffer established that there were "approximately a dozen incidents a week in the Prince George's County Detention Center....Even when rape victims tell guards or medical technicians that they were raped or sexually assaulted, the jail does not consider their cases 'reported' unless the victim presses charges or unless there is clear medical evidence, according to jail spokesman Jim O'Neill." (*op. cit.*)

⁵⁶ Rothenberg article in *The New York Times*, Jan. 22, 1977.

ther abuse and harm."⁵⁷ As one jailhouse rapist, Francis Harper, told Tofani (*op. cit.*): "Prisoners see that the guards don't help so they don't play by the institution rules. They play by the inmate rules, it's safer." Since a reputation as an informer can easily lead

5 to death or serious injury,⁵⁸ the Court must not ignore the fact that survival needs, real and perceived, may make it virtually impossible for most prisoners to give notice—especially specific notice with names and circumstances—of sexual threats and harassments to officials.

10 Another powerful factor is the extreme *humiliation* which most male rape victims perceive as attendant upon their supposed "loss of manhood," and the common (though erroneous) *imputation of homosexuality* to them, both of which factors motivate them to attempt to conceal their victimization from family, friends, and

15 authority figures (including guards and judges).

⁵⁷ Cotton and Groth, "Inmate Rape," *op. cit.*, p. 50.

⁵⁸ "In the aftermath of victimization, inmates adhere to the code of silence. It is therefore very common to find the victimized inmates not reporting their victimization. Witnesses do not volunteer to give information to the correctional staff for fear of endangering their lives. Snitches, as they are called, are not tolerated by other inmates." Chonco, *op. cit.*, p. 77.

Accordingly there is a need for confinement officials to take preventive measures without first requiring prisoners to give specific notice of the danger that threatens them.⁵⁹

G. PRISONER SEXUAL ASSAULT IS INSTITUTIONALIZED AMONG 5 STAFF AS WELL

The institutionalization of prisoner rape commonly extends to the rank-and-file guards⁶⁰ (see *LaMarca* at 1537) and all too often to the ranks above.⁶¹ Rape is often simply ignored by officials, who consider it a public-relations embarrassment and an indication that

10 they are not in full control of their institutions.⁶²

The usual attitude of wardens and sheriffs, as with lower-level staff, towards pervasive rape is to look away. That is why the

⁵⁹ Few rape victims are given such specific advance notice by their assailants; how then could they convey knowledge of such impending harm to officials, even if they could overcome the fear of being branded an informer and the humiliation of acknowledging oneself as a sexually vulnerable male?

15

⁶⁰ "Even when a victim screams for help, guards often do not respond until it is too late." Toffani, *op. cit.*

⁶¹ For a fuller discussion of this phenomenon as it appears in juvenile institutions, see "Staff Exploitation of Inmates: The Paradox of Institutional Control" by Clemens Bartolis, Stuart J. Miller, and Simon Dinitz, in *Victimology: A New Focus*, I. Drapkin and E. Viano, eds., Lexington, MA: Lexington Books, 1974; reprinted in Scacco, ed., *op. cit.*, p. 187-197.

20

⁶² Davis, *op. cit.*

state and federal systems are generally characterized by the absence of staff training, no orientation to the danger for incoming prisoners, no follow-up care for victims, and usually no standard procedures for investigation of sexual assaults or collection of evidence.

5 Of those sexual assaults which *are* reported, a vanishingly small number are ever referred to prosecutors, much less brought to trial.⁶³ Davis (*op. cit.*) also reported that guards commonly pressured victims not to complain or prosecute. A lack of success at criminal prosecutions, or even a low rate of indictment, might be
10 accounted for by the reluctance of victims to testify. But the lack of referral to prosecutors of documented cases, as well as the nearly universal failure to warn new prisoners about the dangers of sexual assault during orientation or to train employees in rape

15 ⁶³ "The victims normally do not press charges against their attackers. Even in cases where rape victims say they wanted to, they say guards or police discouraged them from doing so. As a result, the rapists rarely are punished." Tofani, *op. cit.*

20 See for example the Eighth Circuit's discovery in *Butler v. Dowd*, 979 F.2d 661, 675 (1992) that despite evidence of "at least 100 sexual assaults reported...there were almost no sexual assaults assigned to the prison investigator for investigation, and Dowd never referred even one sexual assault for prosecution."

issues, can only be explained by the institutionalization of sexual assault even among the custodians.⁶⁴

Bowker devoted all of chapter 7 (*op. cit.*) to the direct involvement of staff members in setting up, watching, deliberately avoiding
5 witnessing, and profiting financially from the rape of prisoners. Davis also noted "repeated instances where homosexual 'security' cells were left unguarded by a staff that was too small or too indifferent, or who turned their backs so that certain favored inmates could have sexual relations." (*op. cit.*) Ex-prisoners attest that
10 sexual assault is commonly used as a management tool by administrators.⁶⁵

15 ⁶⁴ The lack of disclosure of rapes, Dumond comments, "is, as noted by many researchers, supported by the institutional environment and staff who often 'penalize' inmate victims when they come forward with such complaints." *Op. cit.*, p. 151.

20 ⁶⁵ Jerry Sousa, then teaching a course on prison life at the University of Massachusetts, told Ted Koppel: "It's generally ignored, sometimes directed by the prison administration. It's a means to strip a prisoner of his dignity or manhood if you will....I've seen prisons where this was tolerated, where rapists who had been known to have raped prisoners, who had physically abused and hurt prisoners very brutally during rapes, were kept in charge of new man-a-blocks —and because they were informers, and that was their reward....Prison administrators condone rape for various reasons:....this is a dividing element that many administrators utilize to keep prisoners fighting with one another..." (ABC News, "Nightline" November 10, 1982, transcript.)
25

See also Donaldson, "Prisons, Jails and Reformatories," *op. cit.*, p. 1045.

Donald Tucker, who wrote the only published account of prison life by an admitted punk in "A Punk's Song: View From the Inside" (*op. cit.*) summarized: "Officials use it [rape] to divert prison aggression, destroy potential leaders, and intimidate prisoners into becoming informers (as before the [1980] New Mexico prison riot)." 5

H. THE RISK OF SEXUAL ASSAULT IS PREDICTABLE

Prisoner rape is far from random (Bowker, *op. cit.*). Demographic risk factors have been well reported in penological literature since at least 1982, and known informally to keepers long before then. Certain characteristics are demonstrably singled out for attention by prisoner rapists. 10

Youth is very well known as one of them. Davis reported that the average age of jail rape victims was 21, contrasting with an average prisoner age of 28. Wooden and Parker reported the average age of heterosexual prisoner-victims at 23, compared with an overall average of 29 in the prison he studied. 15

Small size is equally well known. Davis reported an average weight of 141 lbs. in his victims and 157 lbs. in known aggressors, with a ¾-inch height differential. Lockwood (*op. cit.*) agreed, noting that targets weighed an average of 15 lbs. less than aggressors. 5

Race has been very widely discussed in the literature,⁶⁶ with whichever racial group has the least clout in the institution's prisoner power structure being most often victimized. Interracial rape constituted 56% of Davis' incidents. Lockwood found a 250% differential between racial groups.⁶⁷ Wooden and Parker (*op. cit.*) broke their heterosexual victimization figures down into three racial/ethnic groups, with no heterosexual victims in one group, 4% in the second group, and 17% in the remaining group. 10

⁶⁶ See Peter Buffum, "Racial factors in Prison Homosexuality;" Anthony Scacco, "The Scapegoat is Almost Always White;" and the Davis study, all reprinted in Scacco, ed., *op. cit.*; Bowker, *op. cit.*, p. 8-10; and additional citations in Dumond, *op. cit.*, p. 141. 15

⁶⁷ This was for the New York State survey of six prisons. Lockwood reported that in Coxsackie, a New York State youth prison, 71% of the white youths had been targets of sexual aggression; he did not report data for other racial groups at Coxsackie separately. (*op. cit.*) 20

Sexual orientation was documented as a factor by Wooden and Parker (*op. cit.*), who found that while most prisoner rape victims are heterosexual, homosexuals were over four times as likely to be victimized.

5 Seriousness of offense was studied by Davis (*op. cit.*), who found that only 38% of the victims were charged with serious felonies, contrasted with 68% of the rapists.⁶⁸

New prisoners⁶⁹ and first-offenders⁷⁰ were recognized as particularly vulnerable by the district court in *Van Horn v. Lukhard*,
10 392 F.Supp 384, 387 (E.D. Va., 1975), a perception endorsed by many observers.⁷¹

⁶⁸ One well-known exception is child sexual abuse, which is commonly rationalized as "justifying" rape of the accused or convicted child molester.

15 ⁶⁹ S. Lerner reported in "Rule of the Cruel", *Corrections*, v.3 (1987, first published elsewhere in 1984) that a guard reported to a state legislator in Florida that a young inmate's chances of avoiding rape were "almost zero....He'll get raped within the first twenty-four to forty-eight hours. That's almost standard."

⁷⁰ First offenders were noted as vulnerable by Cotton and Groth, "Inmate Rape," *op. cit.*, p. 53.

20 ⁷¹ "Virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates....Only the tougher and more hardened young men...escape....rape." Davis, *op. cit.*

Other factors which increase the likelihood of targeting are: non-violent offenders (Davis, *op. cit.*), middle-class,⁷² not gang-affiliated, without significant personal combat experience, not "streetwise."⁷³

5 The more of these characteristics a particular prisoner possesses, the more likely he is to be victimized, which should raise the level of concern by administrators for his safety.

Readily available facts about any prisoner, plus a few questions, enable administrators to classify incoming prisoners as to vulnerability as a target, and treat them accordingly.⁷⁴
10

The federal prison system already uses several sets of guidelines to classify prisoners (for various purposes) which assign point values to different factors and use the sum to indicate the appropriate classification category.

15 ⁷² Cotton and Groth, "Inmate Rape," *op. cit.*

⁷³ J. Irwin described victims being vulnerable because they are not "street-wise": they don't know the street language, roles and games and don't know how to protect themselves." *The Felon*, Englewood Cliffs, NJ: Prentice Hall, 1970.

20 ⁷⁴ "One [prevention] strategy is to identify the profile characteristics of victims and offenders and to segregate these groups as much as the physical plant and resources will allow....The potential victim is typically vulnerable by age, size, body build, culture and life style." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 53.

This predictability of risk is relevant, given the widespread knowledge among confinement officials of these facts, to liability inquiries concerning prisoners who should have stood out as targets⁷⁵ in the mind of any competent professional.

5 Those who are most at risk know they are *perpetually at risk*, that rape lurks in showers, toilets, cells, television rooms, libraries, laundry rooms, work sites, stairwells, wherever guards are not watching. And they know that any experienced prison official knows it as well as they do.

10 Cotton and Groth also described a profile of the typical *assailant* as "experienced in institutional life, has done time before, has a history of institutional violence (sometimes clearly including prior sexual attacks), and has a need to establish or defend a reputation."⁷⁶

15 ⁷⁵ "who had 'notice' written all over them" to use a phrase from Bill Gibney, managing attorney, Prisoners Legal Services of New York

⁷⁶ "Inmate Rape," *op. cit.*, p. 53.

I. SEXUAL ASSAULT IS PREVENTABLE

The amicus, Stop Prisoner Rape, is convinced that most sexual assaults in confinement are preventable, and that administrative actions and policies can and do make a significant difference.⁷⁷

5 (See Appendix B)

We suggest that the following practices (none of them particularly expensive) contribute to ending or minimizing rape and its damage to the prisoner-victim:

10 ⁷⁷ Rideau and Sinclair described how a change of administrative policy towards sexual violence made a dramatic difference in Angola prison, *op. cit.*, p. 20-21. See *Redman v. County of San Diego*, 942 F.2d 1435, 1445-47 (CT9, 1991) *en banc*, cert denied 112 S.Ct. 972 (1992) and *Berry v. City of Muskogee* 900 F.2d 1489, 1496 (CT10, 1990).

(1) realistic orientation programs to warn new prisoners;⁷⁸ it was for this purpose that The Safer Society Project in 1993 developed its 27-minute audio tape "I: An Ounce of Prevention," which has already been put to use in the Vermont prison system⁷⁹ and
5 been ordered by scores of institutions from coast to coast. It is the *new prisoner*, not the Warden, who requires specific notice!

⁷⁸ "By training and orienting inmates, providing adequate notice and a mechanism to report such events, as well as an introduction to the prison 'culture' (such as 'do not accept favor or gifts, as there is usually a price') inmates who may be
10 unfamiliar with the prison ethos may be more prepared to fend off such violence." Dumond, *op. cit.*, p. 149

"Upon admission to a correctional facility the inmate should be advised and counseled in regard to the risk of sexual victimization, how he can help reduce this risk, and how he can receive help if he is sexually hassled, exploited, or at-
15 tacked." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 56

"New inmates should be taught about a set-up during orientation." Chonco, *op. cit.*, p. 80.

"Perhaps the most useful small step would be to *prepare* honestly the *incoming first-timer* for what he is going to face....Tell the guys how to avoid rape, prepare them to fight back, and perhaps most importantly, prepare them as well as can
20 be done for the possibility that they may be sexually penetrated, despite all, emphasizing that this does not mean the end of the world or of their heterosexuality, etc." Tucker, *op. cit.*, p. 77

⁷⁹ As part of the *Prisoner Rape Education Project* (*op. cit.*), with the endorsement of Corrections Commissioner Gorczyk and the New York State Council of Churches.

(2) institution-wide **staff training** on rape issues;⁸⁰
(3) mandatory **reporting** to top prison officials of sexual assaults which become known to guards and other staff, and prosecutorial-referral policies in cases where victims are willing to testify;⁸¹

⁸⁰ "In prevention, a key emphasis has to be on providing a vehicle for staff awareness and responsiveness of the problem....One of the ways to ensure prevention is to give officers and prison staff a greater understanding of the outcomes of sexual assault, in particular its relationship to inmate violence and assault on staff." Dumond, *op. cit.*, p. 148
5

"If staff are not adequately trained to recognize and address this issue they are caught off-guard and unprepared to handle such incidents when they occur....Without accurate information on sexual assault within their institution, correctional staff are at a serious disadvantage to remedy this problem." Cotton and Groth, "Inmate Rape", *op. cit.*, p. 48
10

"Creating pro-active policies and trainings that build awareness within your institution that sexual assault will not be tolerated is a critical part of controlling jail and prison rape." Knopp, *op. cit.*
15

⁸¹ "Prosecution and conviction are important strategies to combat inmate rape....The prosecution of such cases makes a clear statement to inmates that coercive sex is not acceptable and will not be tolerated even within correctional institutions." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 57.
20

(4) classification of all prisoners by rape risk factors and known histories and appropriate placement, both within an institution⁸² and among a jurisdiction's facilities;⁸³

(5) sympathetic treatment of rape victims, including trained
5 counseling⁸⁴ and serious consideration of housing change requests;⁸⁵ it was to begin to fill the gap in counseling that The Saffer Society Project developed its 90-minute audio tape "II: Becom-

⁸² "In institutions with more than 500 inmates, classification of inmates should be very tight, suggesting that inmates with prior violent offenses should be segregated from nonviolent inmates or inmates who are vulnerable to victimization." Chonco, *op. cit.*, p. 80.

"Certainly, too, identifying 'at risk' inmates, housing inmates with compatible typologies and swift classification/placement for victims of such assaults are critical ingredients of managing the potential difficulties of such events." Dumond, *op. cit.*, p. 149.

See *Jones v. Diamond*, 636 F.2d 1364, 1374 (CT5, 1981); *Dowd* at 675; and *Vosburg v. Solem*, 845 F.2d 763, 766 (8CT, 1988).

⁸³ "If prisoners with certain characteristics have a notably high risk of suffering sexual assaults, then there is no reason why these prisoners cannot be identified at the point of entry into a correctional system. These men could then be placed in institutions that do not include potential rapists and that are more intensively supervised than other correctional institutions. When we realize this, we see that the policies followed by state correctional administrators must also be considered to be causal factors in producing prison rapes. These systemwide administrators are generally unwilling to spend the time and effort as well as the money necessary to protect easily victimized prisoners." Bowker, *op. cit.* [emphasis added]

⁸⁴ "Not only prisons but jails must be provided with effective psychologists and psychiatrists trained to deal with the trauma of rape and other forms of sexual coercion, and these must advertise their availability and their independence from the administration, which must be real." Tucker, *op. cit.*, p. 77.

⁸⁵ This is particularly important since most prisoner rapes are repeated incidents rather than initial ones.

ing a Survivor" as part of the *Prisoner Rape Education Project* (*op. cit.*).

(6) establishment of protocols for rape intervention and investigation and for medical and psychiatric follow-up,⁸⁶ such as the one
5 in force at the San Francisco county jail,⁸⁷ see also *LaMarca* at 1544;

(7) reduction of prisoner idleness (no work or school assignment).

The amicus further suggests that the following practices (most of
10 which can be changed without great expense) tend to increase the rate of sexual victimization and damage to the prisoner-victim:

⁸⁶ "Once a sexual assault protocol has been established and staff trained to dispell the myths and misconceptions about male rape, the problem can be addressed more rationally." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 54. The authors go on to discuss the needs such a protocol should address. Cotton (see next Note) brought considerable experience to this assessment.

"Establishing a clear protocol for meeting the medical, psychological, legal, social and protective needs of the inmate victim in a timely manner is vital to maintaining the safety and security of each correctional institution." Dumond, *op. cit.*, p. 150.

⁸⁷ Drawn up by Donald Cotton, adopted in 1978 and revised in 1981; printed in the *Overview/Manual of the Prisoner Rape Education Project* (*op. cit.*), as Appendix F, and in *The Journal of Prison and Jail Health*, 1982, vol. 2. No comparably complete protocol is known to exist in any other confinement system, though New York City's jail system has a more sketchy one.

(1) "protective custody" facilities which penalize their residents,⁸⁸ fail to protect them, and are commonly indistinguishable *de facto* from punitive disciplinary quarters;⁸⁹

(2) staff mislabelling of heterosexual "punks" as "homosexuals,"
5 which exacerbates the trauma and promotes suicidal behavior;

⁸⁸ "Inmates who complain [of sexual assault] are themselves punished by the prison system.... This means that after a complaint is made, and especially if it is pressed, the complainant is locked in his cell all day, fed in his cell, and not permitted recreation, television, or exercise.... Many victims consider this 'solitary confinement' worse than a homosexual relationship with one aggressor." Davis, *op. cit.*

⁸⁹ Dr. Rundle: "protective custody is punitive, as well as punitive segregation, as it's usually in the same place with the same kinds of restrictions." Quoted in Rideau and Sinclair, *op. cit.*, p. 21. The two Angola Prison authors continue: "It's usually a locked-down situation, a condition of existence which forces the weaker inmate to eventually reach a point where he decides that it's better to permit himself to be sexually exploited and enjoy a certain amount of freedom rather than the mental and physical anguish of solitary confinement where he stands a good chance of losing his sanity. The punitive and painful nature of 'protection' is one of the major influencing factors in the decision of victims of sexual violence to go on and accept the role of a female rather than report the victimization to the authorities and request protection." See also p. 22-23, *idem*

"No attempt was made to distinguish between the men in the Hole for punishment and those in the Hole for 'protection'; both are denied reading material, full meals, exercise, etc.... I was put in a special section of four-man cells reserved for those needing protection and those taken out of population for starting fights. The fighters, of course, soon 'took' the 'protected' non-fighters." Tucker, *op. cit.*

(3) staff discrimination against homosexuals;⁹⁰

(4) staff stigmatization of rape victims and, given the frequent combination of the two preceding conditions, overt discrimination against rape survivors;

5 (5) failure to provide and protect confidentiality of communications between rape victims and staff members (especially mental health, medical and chaplaincy staff) and of medical and other records of victimization;

(6) ignoring the problem—as Donald Tucker told a hearing of the
10 District of Columbia City Council,

It is stated that the crime of rape has thrived on, above all, silence. This is nowhere as true or as painfully obvious as in the case of rape of men in our prison system. Everyone who has been involved with 'corrections' for any length of time knows that rape is a constant feature, indeed an institution, in the prison system. And yet no one speaks of it.⁹¹

⁹⁰ "Pro-active policies are likely to fail, however, if they are undermined by homophobic myths and attitudes held by the implementing staff. Such widespread counterproductive and injurious myths around the subject of male rape require eradication through a thorough staff training program." Knopp, *op. cit.*

20 "Gay prisoners are the only prisoners in Angola who are locked up because of what they are rather than what they do, and the practice of arbitrarily locking them up raises the question of 'discrimination.'" Rideau and Sinclair, *op. cit.*, p. 25

25 ⁹¹ September 18, 1973, quoted in Donald Tucker, "The Account of the White House Seven" in Scacco, ed., *op. cit.*, p. 42.

(7) open and poorly supervised dormitories;⁹²

(8) the practice of imposing disciplinary penalties for fighting in self-defense, the only way sexual pressure can usually be countered (see Appendix B);

5 (9) policies and practices which do not maintain as wide a gulf as possible between sexual assault, on the one hand, and non-violent sexuality on the other;⁹³

(10) administrative action against protective pairing (see Appendix C), a prisoner custom which *does effectively minimize* further
10 violence against rape survivors—penalizing these pairings and breaking them up merely exposes the survivor to more gang assaults;⁹⁴

⁹² see Lockwood, *op. cit.*, who compared the dormitories in New York to the notorious dormitories in Philadelphia and Arkansas.

15 ⁹³ "When the combination of easy [rape] victims and administrative pressure against pair-bonding arises, as it often does, it becomes less risky to commit rapes than to commit oneself to an ongoing consensual relationship." Donaldson in "Prisons, Jails and Reformatives," in Dynes, ed., *op. cit.*, p. 1041. For more discussion, see Appendix B.

20 ⁹⁴ SPR has concluded that disciplinary sanctions against non-violent sexuality among prisoners in fact strongly contribute to the incidence of rape and are subject to constitutional attack in those jurisdictions, the majority of American states, which do not criminalize such behavior for their citizens outside confinement, since they are penologically counterproductive.

(11) involuntary segregation of homosexuals, which simply increases the pressure to "turn out" the remaining "virgin" heterosexuals.⁹⁵

During the past decade, our society has moved the threshold of
5 acceptable behavior with respect to sexual abuse in such areas as spousal rape, date rape, gender-neutral rape legislation, and child molestation. Prisoner rape is most akin to sexual abuse of children in that we have always disapproved of it, but have only recently
10 come to recognize the extent of it, and we as a nation are beginning to face these problems directly. If confinement administrators are to make a serious effort to bring to the prison, jail and reform school setting some measure of America's modern sensibilities to

⁹⁵ Rideau and Sinclair, *op. cit.*, p. 20, 25

15 Tucker: "In many institutions, queens are immediately segregated from the general population, thus increasing the pressure on the punks who remain." (*op. cit.*, p. 66) He points out on p. 76 that this practice merely results in another heterosexual losing his anal virginity. Certainly that is an incomparably greater disaster than allowing a true homosexual who can handle himself in population and does not wish to lose access to programs and services available to the general
20 population to remain there.

sexual abuse, a systematic effort involving all aspects of institutional life will be required.⁹⁶

Sole reliance on "protective custody" (which Dumond aptly observed "may further victimize inmate victims,"⁹⁷) and internal disciplinary procedures (even coupled with prosecution in court)⁹⁸ does not constitute a *solution* to the problem of prisoner rape.

Indeed, the failure on the part of confinement officials to adopt proactive policies designed to minimize prisoner rape may give rise to grave constitutional concerns. District Attorney Davis, a prosecutor, made no bones about it:

"The sexual system...imposes a punishment that is not, and could not be, included in the sentence of the court. Indeed, it is a system under which the least hardened criminals, and many men later found to be innocent, suffer the most." (*op. cit.*)

⁹⁶ "In the last 20 years there has been attention to systematically identifying [prisoner rape] and to suggesting changes in both clinical intervention strategies as well as prison management policies. Despite these efforts, much misunderstanding, under-reporting, continued victimization and mismanagement within prison institutions continues." Dumond, *op. cit.*

⁹⁷ Dumond, *op. cit.*, p. 150.

⁹⁸ Lockwood noted the difficulties in the disciplinary approach, largely due to the penalties and humiliation inflicted on the victim who testifies.

* * * * *

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for trial on the merits with the widest possible scope for demonstrating "deliberate indifference" to the jury. The opinion of the Court should emphatically convey the gravity with which it views sexual assault in confinement, encourage officials to take positive steps to deal with the problem systematically, and hold the door to the courts open for those so utterly devastated. Then Rev. Dwight's ghost may finally rest in peace.

Respectfully submitted,

Frank Dunbaugh,
Counsel for Stop Prisoner Rape

November 14, 1993

APPENDIX

EXCERPTS FROM THE OVERVIEW/MANUAL OF THE PRISONER RAPE EDUCATION PROJECT

5 by Stephen Donaldson, edited by Fay Honey Knopp, with a
Foreword by John F. Gorczyk, Commissioner of Corrections
of the State of Vermont, published August 1993 by The Safer
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10 the Aaron Diamond Foundation. These texts were written
for staff and administrators.

A. Rape Trauma Syndrome (RTS): What Everyone Should Know

Rape Trauma Syndrome or RTS is a devastating form of
15 post-traumatic stress disorder (PTSD, familiar to many mili-

tary combat veterans) which has been recognized and described only in the past two decades. In some form and degree it affects virtually all victims of sexual assault, including ones who avoided a completed rape. Even verbal sexual aggression without physical coercion—a common experience for prisoners—can leave the target psychologically damaged. For male survivors of an actual rape the disorder is likely to be severe and even life-threatening. Institutions should brook no delays in getting new rape victims into counseling within hours of the victimization; this is a true psychiatric emergency. The physical consequences which often accompany RTS are noted on p. [not included].

RTS was first discerned and described in connection with female victims. Males experience the same problems, but in addition must deal with a number of serious issues specific to their gender which add greatly to the traumatization. Male victims who remain incarcerated and are thus unable to withdraw from the setting of their victimization are seriously handicapped in attempting to recover from the trauma.

Those who are exposed to repeated victimization and must even adapt on a daily basis to being a perpetual and continual victim of unwanted sexual penetration, and who must undertake numerous daily compromises in order to avoid the most catastrophic situations (a description which unfortunately comes to characterize most incarcerated rape survivors), must endure the most extreme form of the syndrome. The literature on therapy, written for male survivors in the community, does not yet take these sharply intensifying factors affecting prisoners into account.

Anyone likely to be in a therapeutic or counseling relationship with a rape survivor should become familiar with the psychological and medical literature noted in the Bibliography (App. D). Other staff members, however, also have to deal with rape survivors and should have at least a basic familiarity with RTS in order to avoid unwittingly contributing to the further victimization of the survivor.

This begins with an understanding of the nature of the worst psychological injuries suffered, since it is in these hy-

persensitive areas that the survivor is most vulnerable to additional, albeit unintentional, traumatization caused by others who deal with him after the physical assault.

First there is the total loss of control over even the insides
 5 of one's own body, resulting in feelings of utter vulnerability and powerlessness. This makes control and power key psychological issues for all rape survivors. In the case of men, who are brought up to expect internal inviolability, are expected to be able to defend themselves against attack, and
 10 are socialized to consider total helplessness incompatible with masculinity and thus intolerable, these issues are heightened. In the setting of imprisonment, the very environment, with its all-pervasive theme of control by the state, continually exacerbates this wound. Whenever decisions are made *for*
 15 the survivor, rather than *by* him, this has the effect of rubbing more salt into the open wound. Therefore persons in positions of authority should *wherever possible* allow the survivor to make his own choices, even if the alternative options presented are unacceptable, in order to help him combat the

feeling of total helplessness which will, if left intact, defeat all attempts to improve his condition. Often this is a question of style rather than substance, but in psychological matters it is the impression which counts. However, when conflicts
 5 arise over confidentiality, participation in prosecution or informing, housing placement, etc., staff members should keep in mind that every action taken which the victim perceives as one of peremptory control will in fact aggravate the trauma and thus, from the survivor's perspective, further victimizes
 10 him.

Second, there is the perception that the victim's sexual identity as a male has been compromised or even demolished and reversed. All but those homosexuals who identify themselves as feminine are gravely affected by this perception. It
 15 results from very widespread attitudes relating to sexual penetration and defeat in personal combat (sexuality and aggression being the two primary remaining sources of male identity to most prisoners), and it is exacerbated by the daily behavior of other prisoners who are aware of the victimiza-

tion and lose no opportunity to remind the survivor of his supposed "loss of manhood." If allowed to go unaddressed, this belief will frequently lead to suicide attempts, other self-damaging behavior, or violently aggressive compensatory behavior. It is absolutely imperative, therefore, that staff persons refrain from implying any slight to the victim's masculinity. To the contrary, all persons in contact with the survivor should go out of their way to emphasize his male status verbally and through body language at every opportunity.

The third major injury, for heterosexual survivors, is often related to manhood issues, and results from peers who spread the unfounded belief that the victim's sexual orientation is compromised or even transformed by his involuntary experience. This perception, if not countered, can also produce suicidal behavior. Unfortunately, staff people frequently contribute to this belief by failing to distinguish between homosexuals and heterosexuals who have been pressured into passive sexual activity or roles. Only careful staff train-

ing with regard to the realities of prisoner sexuality can work to counter this deplorable tendency. Even in cases where prisoners label themselves as "homosexual," staff should be careful to ascertain that this identity existed prior to confinement before reinforcing it by repeating the label; an unsophisticated prisoner may simply be repeating what others, seeking to justify his sexual subordination, have told him, or may be using it as a temporary condition rather than a basic trait. Ultimately one must question whether there is any rationale for making official distinctions of sexual orientation in the environment of same-sex confinement, where sexual behavior both active and passive so commonly involves those who behave heterosexually both before and after confinement. Most specifically, staff members should avoid any implication that a rape survivor would have any less interest in the opposite sex.

Suicidal impulses are so common among males who have recently experienced their first or second rape that any such

victim should be presumed suicidal until a mental health professional determines that this is not the case.

RTS has been observed to proceed in most victims in a series of stages, though they are not universal. The description which follows applies to the untreated survivor; those victims who are given effective psychotherapy or counseling, or even merely exposed to Tape II, may avoid the worst aspects of RTS or be better able to control their actions and feelings.

At first the new victim, especially when removed from the site of the attack, tends to be numb, withdrawn, talks slowly or inaudibly if at all, and denies or disbelieves the experience. Some victims however, are visibly upset and highly emotional, sometimes palpably terrified. These two states may even alternate. Feelings of helplessness and extreme vulnerability (which may appear as indifference to one's fate) are endemic; they may together with the re-experiencing of the original terror induce a kind of paralysis in the face of new sexual aggression; staff members must avoid interpret-

ing such paralysis as consent. Nightmares and sleep disturbances are common. Shame, humiliation, and embarrassment are characteristic. The ability to concentrate may be lost and dissociation ("spacing out") become frequent. Memory may be impaired. Victims should be encouraged but not forced to express themselves. This stage can last up to a week, but many of its features may carry over into later stages.

The second stage displays some or all of the following features: self-worthlessness or self-contempt, self-blame for the victimization (reinforced by those around him—both staff and prisoners—who "blame the victim" in various ways), sense of being a failure, various forms of shame, severe depression, homophobic panic, anxiety, extreme insecurity, obsession with body areas involved in the rape, restlessness, urge to escape, compulsive movement, other compulsive behaviors, inability to trust (including those who are trying to help), disturbances in sexual functioning, resistance to intimacy of any kind, ambivalence towards females, fear of males, fear of being or going "crazy", fear of persecution,

cynicism, social isolation, loss of motivation, anger, and rage, often with body and mind at odds (one agitated, the other calm; later switched). Personal boundaries are confused, and relationships chaotic and conflicted. Again, some of these
 5 symptoms may persist into later stages.

This stage, when outside confinement, commonly develops a marked suppression of feelings combined with an attempt to "carry on like normal." For a prisoner who may be involved in perpetual if less violent sexual exploitation and
 10 who must continually compromise to avoid further gangrape, this may show itself in mechanical compliance with sexual demands while remaining basically numb to the experience, and strong dependency with regard to his new master and protector. Feelings of security and protection, desperately
 15 ly needed, are associated with sexual performance and submission to more powerful men. Survival needs to comply with demands for a submissive role frequently overrule urges to rebel and reclaim autonomy, suppressing these but caus-

ing deep conflicts which appear as disturbances in other psychological areas.

In the third stage, which may be postponed until after release, the suppressed rage resurfaces and may be accompanied by violent behavior, obsession with vengeance or with
 5 the rape experience itself, belligerence towards all holders of power (including institutional staff), disturbing sexual fantasies, phobias, substance abuse, disruption of social life, self-destructive behavior and revictimization, lifestyle disorganization, antisocial and criminal activity, and aggressive asser-
 10 tion of masculinity, including the commission of rape on others. The suppression period can last for many years, even decades. It is important that survivors be steered towards opportunities for continued treatment after release (with
 15 therapists knowledgeable about RTS), when their progress, once outside of the traumatic environment, is likely to dramatically improve.

The final stage involves a partial or complete resolution of these issues and a reintegration of the self which allows the

past victimization to recede in importance, though traces will remain for the rest of his life.

B. Administrative Policy and Prisoner Rape

5 All confinement institutions maintain formal policies against sexual assault of their residents, realizing that such assaults are not only universally offensive but subject the institutions themselves to legal consequences both financial and injunctive, jeopardize the order and security of the institution, motivate suicides and retaliatory assaults, exacerbate racial tensions, threaten major medical problems and expenses (especially the spread of AIDS), raise the general level of violence, promote antisocial attitudes, overload special housing facilities, disrupt residential arrangements, and divert large amounts of employee time and attention from other pressing problems.

Despite these policies, rape and sexual harassment continue to be major realities in most institutions, and fear of sexual

assault contributes to a violent atmosphere far beyond the actual incidence of rape. Clearly the enunciation of formal policies has not been sufficient by itself to combat this problem. In part this is due to factors inherent in the situation of confinement, but other reasons are inconsistency in applying formal policies, reluctance to acknowledge the problem and devote time and energy to it, and a failure to understand how administrative policies in other areas can handicap or favor efforts to reduce the hazard of sexual assault.

10 Without a basic understanding of the roots of prisoner rape, no policy can be successful. Rape of men in confinement institutions shows considerable differences from rape in the community; the environment is a crucial factor. For this reason we have included a bibliography (App. D) so that administrators can educate themselves about the nature of the problem.

Rape is primarily a power issue, and this is especially true in confinement, where prisoners are disempowered in all spheres of their life. This puts men in particular under

strong psychological and social pressure to compensate for their loss of personal power by asserting it, violently or through manipulative pressure, over other prisoners. Therefore any measures which can give prisoners a feeling of more control over their own life (without breaching the security of the institution) will help reduce the impulse towards aggression of all types against other prisoners.

Sexual deprivation, while secondary to power deprivation, is also a factor in prison sexual aggression. In this area administrative homophobia and puritanism have compounded the problem by penalizing non-assaultive sexuality among prisoners and resisting sexual visiting programs.

Prisoner sexual aggression is commonly a group activity, but there are important differences between instigators of sexual assault and those who participate in order to maintain their own standing in prisoner social groupings. Administrators should seek to drive a wedge between these two types rather than treating all alike. Even more important is the

need to clearly distinguish between coercive aggression and voluntary sex.

Administrative inconsistency is most notable in discrepancies between formal policy towards sexual assault and the actions of rank-and-file staff members and officers. These employees all too often discourage prisoner victims from actually using the channels provided by administrative policy and frequently join the perpetrators in blame-the-victim and homophobic attitudes. Some employees may consider rape the "just deserts" of criminal offenders, homosexuals, or "weaklings," while others may subscribe to myths about manhood and vulnerability which result in blaming the victim or disbelieving him. Such inconsistencies are best countered by including sexual assault matters in training programs for all persons who work in the institution, by mandatory reporting policies, and by strong administrative leadership on the part of wardens and sheriffs.

Unfortunately, too many cases have come to light where institutional employees have themselves subverted official

policy by turning a blind eye to problems of sexual assault or, worse yet, encouraging it. This encouragement has derived from attempts to recruit informers using threats of exposure to rapists, to set subgroups of prisoners against each other, and to undermine troublesome and articulate prisoner advocates, but heads of institutions must resolutely make clear to all concerned that such administrative encouragement of sexual assault is totally unprofessional, immoral, and unacceptable.

Reluctance to openly and realistically deal with the problem of prisoner sexual aggression is common, but denying or ignoring it will not make it go away and will instead allow it to fester and multiply. Using these tapes is itself a major step forward in alerting prisoners and staff alike that the administration takes this matter seriously. Incorporation of information on sexual assault in employee training programs, the posting of wall notices and inclusion of notices in prisoner handbooks, and frank discussion of sexual assault in meet-

ings with prisoners and staff will go a long way towards ending the inability of the institution to control the problem.

Because the prisoners themselves are in the best position to prevent and discourage sexual assault, administrations should attempt wherever possible to encourage peer pressure against sexual violence specifically. This becomes possible once the problem is recognized and brought out into the open through the steps outlined above. It requires a clear focus on the issue of violence and coercion rather than a moralistic lecture mixing assault with consensual sex and must appeal to the prisoners' own self-interest in putting the damper on rapes in their own midst rather than exhort them to follow institutional policy. But it is definitely worth it in terms of the headaches it can save you and your staff by preventing problems from arising in the first place.

Administrative policies in many areas have a major impact on the level of sexual violence, but often administrators are unaware of or discount these effects. Classification of incoming prisoners for differential housing assignment has been

recognized as an important tool in minimizing (though it will not eliminate) sexual harassment, but classifiers need to be made more conscious of it. Policy should be developed to evaluate each prisoner specifically as a potential target for sexual assault (see Overview) and to ensure that such evaluations are considered in all housing assignments. Double cells with cellmates chosen by the target are the safest spaces for vulnerable prisoners, with open dorms the riskiest. Attempts to keep prisoner couples apart make the passive member vulnerable to assault and increase the likelihood of retaliatory violence considerably.

Policies which penalize a target of sexual assault for physically defending himself by making him liable to disciplinary punishment for "fighting" encourage the rapist, intimidate the victim, and thus contribute to the problem.

A reliance on prosecution of sexual aggressors as the main administrative response to prisoner rape is simplistic and bound to fail as long as victims cannot realistically be guaranteed security from retaliation. Control efforts can be

helped, in cases where a victim definitely does not wish to be branded an "informer," by making a binding commitment to the victim not to bring formal charges against assailants named by him.

Protective custody is not a lasting solution for the problem of prisoner rape, and the more conditions in p.c. deprive residents of opportunities they would have in population, the more punitive it becomes, further victimizing the survivor, and the less attractive it looks to a victim considering cooperation with the authorities. Caseworkers for vulnerable or victimized prisoners in p.c. should work with the prisoner in developing a plan to deal with the problem upon return to population rather than holding it out as a permanent "solution." (An exception would be jail residents with little time remaining.) Many prisoners have been raped while in p.c., which is then no sanctuary, while others are stigmatized for having been in it and sometimes considered informers for that reason.

Policies which classify condoms as contraband can have the effect of condemning the least violent prisoners to death after a long and expensive illness, and are increasingly being changed or quietly ignored, while many institutions are informally and unofficially making condoms available to prisoners. New policies also need to be developed to assist in the fight against rape. Every institution should develop protocols for crisis intervention and follow-up in order to meet the medical, psychological, and protective needs of the victim and facilitate prosecution when the victim is willing to cooperate. Psychological support must be provided to prisoners who have been sexually assaulted and will suffer the severe effects of Rape Trauma Syndrome (see App. A) as a result. Note that even an unsuccessful attempt at sexual coercion can be highly traumatic for the target.

Survivors of sexual assault should be encouraged to confide in psychologists or chaplains, and the confidentiality of such discussions respected. The advice of such counselors to administrators about the needs of sexual assault survivors or

targets they are counseling should be taken very seriously since unless the prisoner is an informer they are usually in a position to know much more about the threat than administrative or officer staff.

Perhaps the most important step in developing an effective administrative policy to deal with sexual assault is the decision to reserve the full weight of administrative attention and punishment for instances of sexual coercion, while discontinuing sanctions against voluntary sexuality and the formation of stable, protective, and far less stressful pair bonding. Only when the focus is narrow and specific can the real problem be met head-on.

C. PROTECTIVE PAIRING

First documented in America in 1826 (not long after the building of the first penitentiaries), the institution of protective pairing has remained the prisoners' informal answer to the problem of sexual assault in confinement. In typical

confinement institutions the overwhelming majority of survivors of sexual assault in general population become "hooked up" as members of such pairs, however distasteful they may find the idea. The reason why this custom has survived for so long is that the alternatives for the rape survivor are: (1) a series of very serious and bloody fights, (2) suicide, (3) repeated gang-rapes, or (4) permanent consignment to protective custody. These alternatives are usually as unpalatable to the prisoner survivor as they are to the administration. In some institutions, administrative pressure against such relationships is intense enough to leave some survivors unable to obtain protectors and therefore constantly exposed to further harassment and assault.

Since there seems to be no good and practical alternative to protective pairing, it is important for administrators to be aware of the dynamics of such arrangements. Prisoners take them very seriously, for they involve a commitment on the part of both partners which neither can break without major consequences. The quality of these relationships ranges enor-

mously, from virtual slavery and complete exploitation at one end, to a mutually supportive, tender and humanizing exchange of affection or even love at the other.

The senior or controlling partner ("man," "daddy," "jocker," or "pitcher") is more often not a rapist himself, though he may take advantage of the consequences of a prisoner rape in "turning out" a new "punk." He obligates himself to provide complete protection for his junior partner against not only further sexual assaults but all forms of "disrespect" on the part of other prisoners, and in general the widespread knowledge of such protective arrangements among the prisoner population is sufficient to deter conflict. Any "daddy" who fails to protect his partner will make himself liable to ridicule and attempts to deprive him of his own "manhood."

Thus the "hooked up" "daddies" in any institution assume most of the *actual* responsibility for preventing endemic rape in the institution, and may be considered tacit allies of the administration in its efforts to control sexual violence. These "pitchers" are overwhelmingly heterosexual and, following

working-class sexual concepts, do not consider their own acts or relationships to be homosexual. In institutions where sexual assault is seldom reported but in which administrative pressure is brought to bear against known couples, these men
 5 actually increase their liability to punitive sanctions by forming protective relationships.

It has been frequently noted by veteran staffers that aggressive "jockers" who become committed to such a relationship tend, as a result, to become less likely to engage in disruptive
 10 challenges to institutional authority, unprovoked violence, and other reckless or destructive behavior and are thus *less* of a problem to those concerned with the management of the institution. In short, they are more like "family men" with something to protect. (Experience has also shown that
 15 paired-off sexually-passive prisoners are less likely to be the focus of disruptive currents caused by competition among the "jockers" than are the unpaired passives, who are considered "unprotected."

The junior or passive partner ("catcher," whether heterosexual "punk" or homosexual "queen") gives up control over his own body to his "man" as the price for this protection. From the perspective of the rape survivor, this arrangement is not
 5 totally voluntary, since it is motivated above all by the imperatives of survival in an environment which has earmarked him as a perpetual target for gang-rape and other forms of abuse. But such "survival-driven" sexuality is a far cry from and, for most survivors, greatly preferable to, any of the
 10 alternatives. "Hooking up" also limits the survivor's risk of exposure to infection by the AIDS virus and thus plays an important role, which administrators should not overlook, in maintaining the health of the prisoner population.

While it should be clear that survival-driven relationships
 15 do not take place in an atmosphere of free choice, are often coercive, and cannot, given the frightful alternatives, be considered truly voluntary on the part of the passive partner, they are usually clearly distinguishable in many ways from sexual assaults. The rape survivor is often able to choose his

protector from among various candidates and often ends up with a certain amount of leverage within the pair relationship as long as he respects the strict limits established by the prisoner subculture. While a "daddy" will not tolerate open rebellion, he usually seeks to "get along" with his punk and to avoid an atmosphere of tyrannical slavery or total exploitation. The protector can and often does develop genuine affection for his "catcher" and can engage in some degree of mutuality in the nonsexual aspects of the relationship. Any policy that narrows the gap between (a) the punitive consequences feared by a jailhouse rapists and (b) any consequences expected by a non-rapist prospective "daddy" for "hooking up," has the effect of leaving rape survivors more exposed to follow-up assaults and is thus counterproductive to rape reduction efforts. Also, in the absence of clear indications of actual rape or force, treating the controlling partner in protective pairs as a sexual assaulter of the passive partner (despite accepted characterization of such relationships as survival-driven on the part of the passive partner), is both counterpro-

ductive and antithetical to rape reduction. Officers should be discouraged from using the threat of punishment for "voluntary" sexual activity to coerce signed allegations of rape from the passive partner against the active partner. This practice borders on blackmail, demeans the seriousness of a charge of rape, and is highly unprofessional.

Disciplinary codes rest upon an American legal tradition that divides illegal acts into two categories: voluntary acts, for which the participant is held responsible and punishable; or coerced acts, in which case the doer is held to be a victim and considered neither responsible nor punishable. The reality of survival-driven protective pairings, as applied to the passive member, does not fit into this neat scheme, and therefore presents an administrative dilemma when it comes to fair application of certain provisions of disciplinary codes.

By and large, the "pitcher" gives orders and the "catcher" follows them; in a particularly rough institution, the "catcher" may have no more free will than a slave (this is especially so when the catcher belongs to a gang). Thus a "catcher" is

often required to engage in prohibited acts as a condition of his protection, and the free will to violate the disciplinary code that we normally assume to be a precondition for punishment is actually absent. The extent to which such violations are coerced is, however, usually difficult to ascertain, and administrators often feel they cannot just ignore certain types of violations without losing control of the institution. Recognizing these problems, disciplinary bodies are urged to consider the powerlessness of the "catcher" as a mitigating factor of great weight, if not an exculpatory one, in resolving the disciplinary charges involving those types of infractions that are likely to have been ordered by another prisoner.

Protective pairs usually include numerous survivors of sexual assault in prior institutions (juvenile facilities, jails, other prisons) who have learned to "hook up" as soon as possible after arrival in any new confinement site in order to avoid getting raped there. They may not be perceived as rape survivors by staff in their current institution who do not

know their full history, but may erroneously be considered homosexual.

As long as protective pairing remains (for lack of a less damaging alternative) the primary refuge of the sexual assault survivor, administrators who seek to disrupt it should realize that doing so greatly adds to the vulnerability of the known "catcher" and significantly increases the likelihood that he will again fall victim to rape and other forms of sexual coercion. Rape survivors, having considered all other possible courses of action, may choose to enter into a protective pairing relationship as the least damaging way to survive. Administrators who respect this very difficult decision (by supporting requested housing assignments, for example) will be better able to reduce and control sexual violence in their institutions.

Psychologists, chaplains and others in counseling positions should not hesitate to address themselves nonjudgmentally to the psychological and social dynamics of a relationship

which is likely to be the survivor's only lifeboat in a storm-tossed sea.

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Established in 1979 by Russell D. Smith as
10 "People Organized to Stop Rape of Imprisoned
Persons" (POS RIP)

National Office and Executive Director: Tom
Cahill, PO Box 632, Ft. Bragg, CA 95437; (707)
964-0820

15 **President:** Stephen Donaldson: 3149 Broadway,
No. 4, New York, NY 10027; (212) 666-0344

WHAT IS "STOP PRISONER RAPE"?

Stop Prisoner Rape (SPR) is a small national non-profit
organization dedicated to combatting the rape of prisoners
and providing such assistance as we can to survivors of jail-
5 house rape.

Both our president and executive director are survivors of
jail gang-rapes which followed arrests for protesting the war
in Indochina, and its president spent nearly five years in fed-
eral prison. Thus we maintain a practical perspective rather
10 than an academic one. We believe that prisoners themselves
can be most effective in discouraging rape in their own institu-
tions, but believe there is much that administrators must and
can do to address this horror. We are not a prisoner organi-
zation, but we welcome membership from anyone, including
15 prisoners, who is dedicated to the effort to stop prisoner
rapes.

According to the best and most thorough statistical survey of a prison (a medium-security California institution, reported in 1982 by Prof. Wayne Wooden and Jay Parker), 14% of the entire prison population was sexually assaulted in that prison.

- 5 The authors believed that this *underreported* the extent of rape, and being limited to events in that institution it did not count prisoners who had been raped in jails or other prisons and learned to pair off with a protector as soon as they arrived. The only survey of a jail, by Philadelphia District Attorney Alan Davis in 1968, reported that over 3% of the men
10 who passed through the jails of that city were sexually assaulted; Davis also stated he believed it to be an undercount. We do not know how many boys are raped in juvenile facilities, but by all accounts the situation is the worst at that level.
- 15 Women prisoners are raped by male institutional employees to an unknown extent.

SPR has taken the position that rape is **menticide**, the killing of the mind and spirit. The consequences of rape trauma syndrome, already horrendous for female and gay male

- victims in the community, are greatly magnified for incarcerated males who are forced into an unfamiliar passive sexual role (most victims as well as almost all jailhouse rapists are heterosexual by self-description and by practice outside of
5 confinement) and then must adapt to a continuous unwanted same-sex situation from which they cannot escape. While most victims are heterosexual, known homosexual prisoners are particularly likely to be targeted for sexual assault and often find that institutional staff is indifferent to their plight.
- 10 Furthermore, with most systems refusing to allow condoms in their institutions, and HIV rampant among prisoners, survivors who pair off with a protector in order to avoid continuous gang rape (the usual outcome) are put at great and avoidable risk of infection with the AIDS virus.
- 15 We do not hesitate to point out that too many institutions have in the past either turned a blind eye towards this horror, or even tacitly encouraged it, but we feel that since sexual assault and the constant fear of it and countermeasures which result are extremely disruptive and time-consuming, in the age

of AIDS the financial consequences of medical care for infected survivors are staggering, and survivors are increasingly successful in winning major damages in the courts, we can find common cause with modern administrators and staff and

5 work together to limit this scourge of life behind bars. We believe, however, that this effort will usually require a reevaluation of institutional policies in many areas, particularly with regards to reporting of incidents and prosecution of offenders, protective custody, housing assignments, protective pairing,

10 non-assaultive sexuality, medical procedures, psychological aftercare, confidentiality in counseling, prisoner orientation, and staff training.

SPR does what it can with very limited resources to educate prisoners, the public, and incarceration professionals, and to

15 reach out to survivors both in and outside the walls. We want to cooperate with administrators willing to face this problem by providing realistic staff training and information. Eventually we would like to provide face-to-face counseling for incarcerated survivors. We also provide free literature to prisoners

and free copies of a 90-minute audio tape, *Becoming a Survivor*, to prisoners who have been or expect to be sexually assaulted and who request and are allowed to receive them. SPR worked with the Safer Society Press (a national project

5 of the New York State Council of Churches) to produce the Prisoner Rape Education Project (PREP), of which this tape is a part. Another tape is designed for prisoner orientation programs and emphasizes rape avoidance (both also available in Spanish), while a 46-page booklet for institutional staff

10 members (with a foreword by the Vermont Commissioner of Corrections) discusses realistic ways that the institutions can discourage rape and improve the wretched lot of the survivor. We strongly urge institutions to acquire the PREP materials, use the tapes, and circulate the booklet among administrators,

15 mental health professionals, chaplains, medical personnel, caseworkers and counselors, staff trainers, protective custody unit staff, and line officers, each of which (except for p.c. staff) will find a section addressed to their own specialty.

Much of our work consists in attempts to end the curtain of silence which has so long surrounded the rape of prisoners. Rape of males has long been such a tabooed subject for public discussion that numerous myths and misconceptions have been allowed to flourish. It is important to know that **anyone** can be raped, that rape is a crime of power which cannot alter the victim's masculinity or sexual orientation.

Once a prisoner is raped, he is stigmatized and marked as a victim for repeated sexual assault for as long as he remains locked up. Most victims are young, straight, and non-violent, unable to defend themselves against ruthless exploitation. **The purposes of SPR are to provide education, information, and advocacy at all levels with regard to this ongoing nightmare of sexual assault and enslavement; to provide encouragement, advice, counseling, and legal support to survivors; to train the staff which must deal with them; and to combat this systematic horror in every way possible.**